

**Question 3: Are there other approaches to defining “waters of the U.S.” that you would like the agencies to consider to providing clarity and regulatory certainty?**

**Background**

The 2008 guidance document (issued post-*Rapanos*) offers assistance and criteria to assess jurisdiction of WOTUS (post-*Rapanos*). It is consistent with the Scalia approach but also asserts criteria to be used for further consideration of CWA jurisdiction (over some waters). This approach would reflect the opportunity to cover waters significant to states, localities and tribes. The new WOTUS rule should also confirm certain exemptions from federal jurisdiction, offering federal clarification where there has previously been uncertainty. These exemptions include stormwater detention ponds, wastewater treatment facilities, irrigation ditches and "puddles."

**Recommendations:**

The LGAC recommends that a similar approach articulated in the guidance to the 2008 guidance be used to revise the WOTUS rule.

The 2015 CWR regulates any area having a trace amount of water if it also has – or ever had – a bed, bank, and an ordinary high water mark (OHWM). This could include many channels and other features that are almost perpetually dry. For the 2017 revised rule, there should be more predictability and certainty in general if there is a dry bed with a OHWM (with historical aerial or infrared photography that it can be established as a WOTUS) or exempt.

**Question 4-The agencies’ economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could be affected but would not be captured in such an economic analysis?**

**Background**

A revised Clean Water Rule is expected to have increased clarity and certainty to the process of making jurisdictional determinations under the CWA. Individual jurisdictional determinations can be time-consuming and resource-intensive for the agencies, permittees, business community and local governments. A revised rule should be designed to reduce the uncertainty and clarify categories of waters that are jurisdictional or not jurisdictional by simplifying the process. Clarifying the CWR will reduce the costs and have positive economic benefits. However, the rule itself does not incur direct costs. The rule only applies when a permit is required for a pollutant discharge that would degrade, pollute or destroy a water body. On a positive jurisdictional call, it is uncertain how high the direct costs would be and who would pay those costs. More clearly defined exemptions will lessen the trigger for a CWA permit. However, it is uncertain the direct costs of either a positive or negative jurisdiction determination. Conceivably, a positive jurisdictional determination could trigger permitted activities potentially threatening or polluting waterways. This is especially a concern of local governments as it applies to water bodies that are used for drinking water sources. Because of the high costs of water treatment to meet drinking water standards these costs are often transferred directly to the rate payer and citizens. If a water body is polluted or destroyed, then cost at the local level could pose serious economic costs. Whereas, under a CWA permit, the permittee would seemingly be required to pay mitigation costs rather than the costs transferred to the local government or rate payer. Also, as state or local programs assume more authority, likely with more

efficiency, the costs to manage permitting program could increase. States and local governments would not be able to assume these costs without additional resources. Therefore, the economic analysis should be broad and the direct and indirect costs be considered.

### ***Recommendations:***

■ The Economic Analysis should be broad to include impacts to not only Clean Water Act programs but also state and local programs.

Below are programs from a local government perspective that should be considered in the Economic Analysis:

- ✦ **Source Water Protection**-There is a general consensus that protecting the nation's water resources is important to local government. Local governments realize that poor water quality affects the health and economies of their communities, disproportionately impacting those that are low-income. Local governments also realize that protecting source water bodies like rivers, lakes, streams, wetlands and groundwater is paramount to protecting drinking water. (LGAC 2016 Drinking Water Report). **Under the Safe Drinking Water Act**, Source Water Assessments (SWAs) provide information about sources of drinking water used by public water systems. SWAs are studies or reports developed by states to help local governments, water utilities, and others protect sources of drinking water and are done differently by each state. Each program is adapted to a state's water resources and drinking water needs. To protect source water, the tools of the Safe Drinking Water Act (SDWA) and Clean Water Act (CWA) programs are utilized to protect source water. Additional protection tools can be found in other EPA programs and various agricultural programs. Changes made to CWA programs may greatly impact state and local source water protection programs and plans. This could have significant economic impacts to local communities. For example, in Flint, Michigan, shifting the source water to the Detroit River water resulted in significant deterioration of water quality that produced significant public health and economic problems. In Portland, Oregon, where source water is protected, treatment cost is less by having Clean Water Protection programs in place. It is unclear how changes in a revised rule will impact streams and tributaries that impact local sources of drinking water. If adequate CWA protections are not in place, it could have significant negative economic impacts to water utilities. These costs are likely be transferred to local governments and rate payers. It is also unclear how this may impact the prevalence of toxic algal blooms which have proved very costly impacts to communities' drinking water.
- ✦ **CWA Section 402** - The NPDES permits and discharges could hold significant economic issues for local governments in regard to WOTUS for wastewater treatment, stormwater management, CSOs, and application of pesticides (used for vector control). There has been a concern about expanded federal jurisdiction to previously unregulated streams, ditches, and wetlands. However, a revised rule will include exclusions beneficial for those that operate MS4s. The rule includes key exclusions that may be useful for localities. The rule retains a long-standing exclusion for "waste treatment systems," such as treatment ponds and lagoons. It also adds new exclusions for artificially created ponds, settling basins, construction and mining excavation pits, and wastewater recycling structures. Lastly, the revised rule could finally codify the well-understood principle that the CWA does not apply to groundwater. For MS4s, the primary concern about the 2015 CWR was it could potentially be used as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are "waters of the US." For example, that could mean that NPDES permit coverage would be required to discharge into an MS4 or that a CWA 404 permit would be required to do maintenance on a BMP. The 2015 CWR includes, for the first

time, a regulatory exclusion for “Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.” However, the exclusion does not apply to ditches that were created in previously existing streams or wetlands. The rule’s exclusions are important because they take precedence over the rule’s jurisdictional tests. For example, a stormwater conveyance ditch that qualifies for the stormwater exclusion would be excluded from CWA jurisdiction even if the ditch would be considered a jurisdictional water under the tributary test. Furthermore, in a reversal of EPA and the Corps’ previous position, the agencies stated that they do not retain any discretion to extend CWA jurisdiction to water features that qualify for one of the rule’s exclusions. It is unclear how a revised rule will impact Section 402 permits. Potentially, Section 402 permits could prove more costly than Section 404 permitting at the local level in regard to stormwater and wastewater treatment.

- ✦ **Pesticide Applications in Waters of the U.S.-** Since 2011, pesticide applications into, over, or near WOTUS are permitted under the CWA National Pollutant Discharge Elimination System (NPDES) Program due to a 2009 U.S. Court of Appeals for the Sixth Circuit ruling. Agricultural producers, pesticide applicators and local governments have opposed or expressed concerns on the permitting largely on the grounds that it is duplicative and unnecessary to regulate pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Local governments, mainly county governments are largely responsible for vector control programs to manage mosquitos and spraying of insecticides to reduce vectors and public health concerns. Although the 2015 CWR would have arguably expanded the scope of the waters requiring pesticide permitting, the replacement or elimination of the CWR will not end NPDES requirements for pesticides. However, it may provide opportunity to clarify what discharge waters are subject to federal versus state permits.
- ✦ **Section 303 (d)-** Currently, The National Rivers and Streams Assessment (NRSA) 2008-2009 report provides information on the biological and recreational condition of the nation’s rivers and streams and the key stressors that affect them. The Report indicated that about half of our nation’s streams (some of which provide sources of drinking water) have poor water quality. Poorer water quality could result in significant treatment costs such as Impaired Water sites under CWA Section 303(d) which could transfer the costs to local governments. In addition, in communities that rely on these water bodies for drinking water and source water, the cost will ultimately be transferred to rate payers, having a significant economic impact to local governments. It is uncertain how changes in a revised WOTUS rule will impact on local governments and their local efforts to improve access to clean water.
- ✦ **Section 319 and Other Grants-**It is uncertain as to how the determination of WOTUS will impact grants to states and communities. A grant may be given a priority if given to protect a ‘Water of the U.S.’ It is uncertain how that would impact states and communities.
- ✦ **The Coastal Zone Management Act (CZMA) of 1972** provides for the management of the nation’s coastal resources, including the Great Lakes, administered by the National Oceanic and Atmospheric Administration (NOAA). The goal is to “preserve, protect, develop, and where possible, to restore or enhance the resources of the nation’s coastal zone.” The National Coastal Zone Management (CZMA) Program aims to balance competing land and water issues through

state and territorial coastal management programs managed through state and local Coastal Zone permits. These CZMA Programs work in tandem with the many tools of the CWA including Section 404. The Economic Analysis should include an assessment of the economic impact to coastal resources and wetlands, including an economic impact analysis to water dependent industries such as fishery (salmon and seafood industry), tourism, and other water dependent industries. For example, in the Puget Sound region, fish hatchery and harvest operations reeled in about \$18 million to tribal personal income. In areas where the average annual per capita income is around \$10,000, a decline in the availability of healthy fish can significantly impact the economies of these communities. (LGAC Drinking Water Report). An example, the LGAC worked with is evaluating the impacts of the Deepwater Horizon Spill to local governments in the Gulf of Mexico. The Gulf fishing and tourism industries produce \$3.5 - \$4.5 billion a year. Without adequate federal CWA authorities in place other potential impacts could occur, having deleterious impacts to local economies and natural resources.

☐ **Question 5- What additional information can you provide from a local government perspective that EPA should be aware of?**

## DEFINITIONS

### *Background*

Clear definitions are critical for the revised WOTUS rule. The LGAC fully supports and endorses EPA's efforts for clarification of 'Waters of the United States'. These improvements are long overdue. The LGAC highlights clarity in definitions, which is critical for the revised rule. While the LGAC does not have specific language recommendations for all of the definitions of a revised rule, the LGAC offers the following for the EPA to consider including, redefining or clarifying in the rule.

### **Recommendations:**

The LGAC puts forward the following definitions brought forward to consider in the 2017 WOTUS Rule.

■ EPA should, where appropriate, use definitions that are used consistently across all of the federal agencies, e.g. EPA, Army Corps of Engineers, Federal Emergency Management Agency, Department of Agriculture, U.S. Geological Survey and U.S. Forest Services. (LGAC 2014 Report)

■ EPA should task an Interagency Workgroup to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review. (LGAC 2014 Report)

■ Definitions should be practical, written in plain English, and be enforceable. (LGAC 2014 Report)

■ The LGAC recommends that narrative descriptions with examples be provided to augment the definitions, as well as pictures, where this could achieve greater clarity. (LGAC 2014 Report)

■ The public should have the opportunity to comment on revised definitions. (LGAC 2014 Report)



■ The following terms, among others, should be defined concisely and with clarity: 'other waters', 'adjacent', 'irrigation-induced wetlands' and 'upland'. Furthermore, the LGAC recommends 'upland' be defined based upon exclusion of what it is not. (LGAC 2014 Report)

■ The LGAC recommends that EPA consider the following when defining these terms: (LGAC 2014 Report)

### **Wetlands**

- ✦ The current definition of wetlands should be used: "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

### **Floodplains**

- ✦ The definition of the Interagency Taskforce on Floodplains should be used: "Floodplains include low-lying areas adjacent to and the water bodies of streams, rivers, lakes, estuaries, and coastal zones that are inundated or may become inundated as a result of changing conditions." The definition of floodplains should take into account movement of flood lines due to extreme weather events.

### **Riparian area**

- ✦ The LGAC recommends that riparian areas be defined as "an area bordering a water where surface or subsurface hydrology directly influences the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."

### **Floodway**

- ✦ 'Floodway' should be defined as a flood course within the banks or within a canyon where water would be expected to flow under normal circumstances.

### **Ditches**

- ✦ A clear definition of 'ditch' should be provided in the proposed rule.
- ✦ The following Google Dictionary definition of 'ditch': a "narrow channel dug in the ground typically used for drainage". Examples listed are trench, croft, channel, dike, drain, watercourse conduits.

### **Significant Nexus**

- ✦ The most important definition contained within the proposed rule and at the heart of jurisprudence in the issue of 'Waters of the U.S.' is 'significant nexus'. It is uncertain how 'significant' nexus would be interpreted so the Committee recommends EPA describe significant nexus such that it is in plain English, with specific terms and examples.
- ✦ The agency should consider all three parameters of water quality "the chemical, physical, and biological integrity of water" as criteria for 'significant nexus'. Likewise, the LGAC does not

agree that only one of these features be used as the benchmark, but that all three parameters of chemical, physical and biological integrity of a water body are all equally important.

- ✦ The LGAC does not agree with the use of the term “significant effect” and also recommends language of “insignificant or speculative” should not be used.
- ✦ EPA charged the Science Advisory Board with interpreting significant nexus and connectivity based on the best science available. The LGAC is uncertain as to how the revised rule will make benefit of these important and critical definitions; however, the findings may be important to factor into a revised rule.

## **Streams and Tributaries**

### **Tributaries**

- ✦ A clear definition of ‘tributaries’ be included in the proposed rule using clarifying examples.

### **Streams**

- ✦ The revised rule should define the term “rain dependent stream”. An example of a stream that is not rain dependent be provided.

## **ENVIRONMENTAL JUSTICE**

### **Background**

The LGAC would like to assure that all, but especially EJ, small, rural and tribal communities have access to safe drinking water and these water sources protected and made accessible. (For example, disproportionately low income communities do not have access to drinking water and source water which is sometimes the only source of drinking water).

### **EJ Communities:**

- ✦ Must have regulation and enforcement that is coordinated among all levels (federal, state and local) to assure we protect water now and for our future generations, since water is life.
- ✦ Must have protections against current contaminants but, as well, engage the scientific community to preserve safe drinking water, and recreational waters from new and emerging contaminants. EJ communities and Tribal communities depend on clean and safe water for their food supply, as well.
- ✦ Need to have clearly defined WOTUS, what they are and engage EJ communities to better understand protection of these valuable watersheds and bodies of water.
- ✦ Look to local communities to find local solutions. Water infrastructure resources, including clean and safe source water, are needed for EJ communities to ensure safe and accessible drinking water.
- ✦ Must have assurances that for all issues of WOTUS that EJ communities are included in any economic analysis to assess cumulative risks for the lack of safe drinking water and/or for being exposed to contaminated water (lead, mercury).

- ✦ Need to be integrated in urban and rural planning in coordination with state and federal partners for Flood control impacts of a narrow CWA interpretation.

### ***Recommendations:***

■ The revised WOTUS rule should serve as another important tool towards advancing clean safe drinking water for all communities throughout the country, but especially for EJ, small, rural and tribal communities.

■ The revised WOTUS rule must include protections for the access of reliable, clean and safe drinking water especially for disproportionately affected low income EJ communities (who already have significant health disparities) and vulnerable populations across the country.

■ The revised WOTUS rule should protect communities against downstream impacts of agricultural runoff, sewage, industrial waste, mining, flooding and improper disposal of medical waste.

■ The revised WOTUS rule must assure protection of water bodies from contamination that can significantly harm the health of a community.

■ **Question 6- Are there other issues the agencies should consider which would help ease the regulatory burden for implementation of WOTUS for state, local and tribal government?**

### ***Background***

The LGAC believes that clear boundaries of WOTUS jurisdiction and clear exemptions are crucial for the support of local governments. Clear boundaries provide for more equitable and predictable permitting and also for better protection of our water resources. (LGAC 2014 Report)

The LGAC concludes, based upon the testimony that we heard and the analysis of the Committee, that a revised rule can significantly clarify the historic confusion and uncertainty resulting from conflicting case law and Supreme Court decisions. (LGAC 2014 Report)

In 2014, the LGAC heard a broad level of concerns raised by municipal associations and county governments concerning MS4s. The LGAC is uncertain of what the regulatory impact will be on MS4s as a revised rule is currently not written. MS4s and green infrastructure are foundational to the continuum of care that is being implemented at the local level to improve water quality. (LGAC 2014 Report)

Much of the uncertainty of MS4s (in 2014), was that stormwater and green infrastructure is centered on whether these collection systems or portions of the systems would be required to meet State Water Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load (TMDL) because they will now be considered a "Water of the United States." WQS and TMDL were not

designed for this application so application within a collection system seems not warranted. WQS define goals for a water body by designating its uses and setting criteria to protect those uses, but there is no established designated use for MS4s. Without a designated use, the default is "fishable/swimmable," unless the state demonstrates that it is not attainable for one of six particular reasons, none of which is because the waters serve as stormwater conveyances. A pending EPA proposed rule on water quality standards could make use designation analyses more stringent (i.e., by requiring a "highest attainable use" presumption). Also, if it is not deemed jurisdictional under Section 404 it will likely need a Section 402 permit and subject to WQS. (Iowa NLC Letter)

There could be potential impacts to wastewater systems and NPDES permitting related to these systems. Because of the exclusion language, the Agency did not seem to analyze the impact to wastewater systems but some cities have raised questions whether some part of combined sewer systems or other aspects of a wastewater treatment systems would be considered within the jurisdiction of the EPA, based upon the WOTUS rule. (Iowa NLC Letter)

Many communities already heavily focus on water quality programs and projects; these communities should be encouraged and incentivized to do more. A revised WOTUS rule should recognize that much of the action towards cleaner water happens at the local level. High performing local agencies should be noted as following best practices and afforded a relaxed regulatory environment in those circumstances where water quality objectives are met and exceeded. (LGAC 2014 Report)

The LGAC believes that making jurisdiction calls of what is 'exempt' and what is not in a timely fashion is critical to protecting water resources and providing predictability to state and local governments. The LGAC believes that easily accessible predictive tools need to be developed and utilized to speed this process. (LGAC 2014 Report)

### ***Recommendations:***

■ The LGAC recommends that the use of State General permits be expanded to reduce the regulatory burden and also be used for smaller projects with minimal impacts. It could also be used to address regional and state-specific activities and special water bodies. Under Section 404(e) of the Clean Water Act, the U.S. Army Corps of Engineers can issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects. Nationwide permits can authorize a wide variety of activities such as mooring buoys, residential developments, utility lines, road crossings, mining activities, wetland and stream restoration activities, and commercial shellfish aquaculture activities. All permits, whether individual or general, must be reissued every five years.

■ The LGAC recommends that EPA clearly articulate jurisdictional waters in an outreach plan which, in plain English, describes these areas with a clear statement of why they are in need of protection. This will provide local governments with more certainty and assurance in communicating the rule to their communities. (LGAC 2014 Report)

■ The LGAC highly recommends explicitly specifying when ditches would be considered jurisdictional. (LGAC 2014 Report)

■ The LGAC recommends that manmade conveyance components of MS4s be exempt from 'Waters of the United States.' This includes manmade green infrastructure, roads, pipes, manmade gutters, manmade ditches, manmade drains, and manmade ponds. (LGAC 2014 Report)

■ The LGAC recommends that natural conveyance components of MS4s are included in 'Waters of the United States.' This includes natural wetlands and associated modifications to natural wetlands. (LGAC 2014 Report)

■ The LGAC recommends that green infrastructure projects be exempt from WOTUS and that they should be incentivized to protect water resources. (LGAC 2014 Report)

■ The LGAC recommends that there be some criteria which exempt certain activities in 'Waters of the U.S.' for public safety and hazards. This is particularly critical in flood prone areas and for disadvantaged communities in floodways that may need to have emergency relief quickly and rapidly. (LGAC 2014 Report)

■ The LGAC recommends that EPA work to identify regional areas where jurisdictional determinations could be problematic in terms of sea level rise and where groundwater and surface flow intermix. For example, it is unclear how the state of Florida, with so much land area nearly at sea level, will be categorized. In this specific region, conceivably all waters could potentially be jurisdictional. The LGAC recommends that specific guidance be developed to address and classify these areas with region-specific criteria to assess jurisdictional determinations. (LGAC 2014 Report)

■ The LGAC recommends that EPA, working with the Corps of Engineers, develop a tool for use by local governments which a permittee can use to assess their own jurisdictional status. For example, this could involve a simple categorical, printable questionnaire in a decision tree framework with questions aimed with an outcome of 'yes', 'no' or 'maybe'. The LGAC recommends this method be computerized and developed as a smartphone application which yields a simple predictive outcome. (LGAC 2014 Report)

■ The LGAC recommends that EPA work directly with stormwater associations to provide guidance to best address MS4s, stormwater controls, and their jurisdictional determinations. (LGAC 2014 Report)

■ The LGAC recommends that EPA look to stormwater experts and the practical advice that stormwater professionals can lend to a proposed WOTUS rule that the EPA is considering for 'Waters of the U.S.' (LGAC 2014 Report)

■ The LGAC recommends addressing how mining impoundments, borrow pits and tailings ponds will be addressed within jurisdiction of WOTUS. (LGAC 2014 Report)

■ The LGAC recommends that regional and local technical manuals as well as other communication tools (e.g. checklists, smartphone apps, etc.) designed to account for geographic differences in each EPA region be developed to assist with jurisdictional calls. (LGAC 2014 Report)



■ The LGAC recommends that EPA provide planning maps at the state level which could be used as a planning tool to ascertain jurisdictional probability with high certainty. Such mapping would include the Hydrologic Unit Codes (HUC) for waterways. (It is presumed that all waterways with a designation of HUC-12 or less will be included in WOTUS.) (LGAC 2014 Report)

## **IMPLEMENTATION**

### ***Background***

The LGAC heard strong concerns (in 2014) regarding implementation, especially from local governments. Several local agencies reported uncertainty in interpretation as well as uncertainty in time and cost to undertake the permitting process. The rule language must be consistently interpreted by all parties including the EPA, the US Army Corps of Engineers and local agencies. The rule should stipulate responsiveness of permitting agencies. Otherwise, the LGAC is concerned that a revised rule could further delay permits at the local level. (LGAC 2014 Report)

### ***Recommendations:***

■ The LGAC recommends that a revised rule stipulate time frames for permit review and jurisdictional determinations. Time frames such as 60 to 90 days to obtain a permit would be well-received at the local level. (LGAC 2014 Report)

■ The LGAC recommends that EPA more clearly identify how Preliminary Jurisdictional Determinations would be processed to avoid unnecessary permit delays. (Iowa NLC Letter)

■ The LGAC recommends that EPA Administrator work with the Chief of the US Army Corps of Engineers to determine a process to reduce the issue of permitting delays of Section 404 permits. These delays are a significant and a costly issue for local governments. (LGAC 2014 Report)

■ The LGAC recommends that state agency staff be utilized to make jurisdictional calls and work in cooperation with local districts with subject matter expertise such as county-based Conservation Districts or water management districts (e.g. Florida Water Management District). These local agencies can work together with the Corps to streamline permitting. (LGAC 2014 Report)

■ The LGAC recommends that EPA regionalize wetlands delineation manuals to take into account regional and local variability of vegetation, hydromorphology and hydroperiods. (LGAC 2014 Report)

■ The LGAC recommends that State agencies be delegated the authority to make jurisdictional determinations. These determinations could be certified by the EPA and Corps District staff. Potentially, private sector firms and/or individuals could be certified to make these determinations. This could relieve overburdened federal agencies and accelerate the determination/permit process.

■ EPA and the Corps should encourage and provide incentives for States and Tribes to identify and protect significant state or unique waters such as sources for drinking water to protect.

■ EPA and the Corps should provide mapping of jurisdictional waters (8-Digit HUC). It should also be accessible by zip code and available online. (LGAC 2014 Report)

■ The LGAC recommends that EPA work further with the Committee to develop a cohesive strategy to address local tools for stream and tributary protection so that it does not interfere with local governments protecting and maintaining water resources for its citizens and communities. For example, many local governments have zoning ordinances and coastal management plans that are protective of streams, riparian areas, and sensitive wetland areas. It is unclear how a revised WOTUS rule will affect our ability at the local level to protect our significant ecological areas. (LGAC 2014 Report)

■ The EPA should work with local communities to utilize the regulatory tools that the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) provide in order to protect source water, especially for low-income, minority, rural and tribal communities where this threat remains. (LGAC Drinking Water Report 2016)

■ The LGAC strongly recommends that the EPA continue to explore how the SDWA and the CWA could be coordinated to better protect source water and our nation's water resources. In addition, the LGAC recommends that the EPA coordinate a Memorandum of Agreement with the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) to explore ways to reduce agricultural runoff and improve soil health. (LGAC Drinking Water Report 2016)

## **STATE ASSUMPTION OF SECTION 404**

### ***Background***

Under current regulations, states and some tribes may seek delegation to implement CWA § 404 which governs dredge and fill activities in wetlands and other waters. This CWA assumption allows a state or tribe to regulate those waters and to take jurisdictional responsibility to condition, approve or deny dredge and fill permits in lieu of the federal Section 404 program administered by the Corps and EPA. The state or tribal program must be approved by the EPA and the Corps of Engineers. States and tribes play a significant role in implementing CWA Section 404 Program through assumption and to fully integrated and comprehensive water program addressing the full range of state, tribal, and CWA requirements. Assumption allows for flexibility, less time constraints and the ability to integrate state and local water quality objectives.

The State of Michigan has received delegation authority and the LGAC was briefed on their program. Under the Michigan program, the permitting process is more streamlined and has incorporated other state statutory programs like CWA § 401 certifications, dam safety and other state regulatory programs. The average time of the permitting process is 21 days.<sup>7</sup>

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<sup>7</sup> "Wetlands Protection." Michigan Department of Environmental Quality. [www.mi.gov/wetlands](http://www.mi.gov/wetlands).

Based on the Michigan example, the LGAC believes that states may more effectively administer the Section 404 program, especially in addressing regional issues. States can more effectively interact with local governments, businesses, agriculture and private landowners. (LGAC 2014 Report)

### ***Recommendations:***

- The LGAC believes that State Assumed CWA and tribal-led programs may provide substantial cost-savings in time and money and should be investigated further. (LGAC 2014 Report)
- The LGAC recommends that guidance be developed to facilitate State Assumption of the Section 404 program.
- In order for state assumed programs to be successful, adequate resources must be made available and comparable water quality protections must be adopted by the state or tribal government. Despite these perceived barriers, the LGAC believes this is a highly worthwhile approach. Incentivizing the delegation program could achieve a strong return on investment. (LGAC 2014 Report)
- Local agencies may also be more receptive to a revised WOTUS rule if it is a state-run program which can be more responsive to local and regional issues. (LGAC 2014 Report)
- The LGAC strongly suggests federal incentives for States and Tribes to assume the CWA Section 404 program. These federal incentives should also provide technical, financial and staffing resources to assume the CWA 404 program. (LGAC 2014 Report)

## **ENFORCEMENT**

### ***Background***

The LGAC believes that enforcement will be important in implementing the CWA programs to follow a revised rule. It is not possible to ascertain the impacts of enforcement on local governments without a revised rule currently in place. The LGAC also believes that clarified definitions contained within a revised WOTUS rule will be critical to effective and equitable enforcement of the rule. (LGAC 2014 Report)

### ***Recommendations:***

- The LGAC recommends that flexibility is important within the regulatory context so that conservation practices can be considered nationwide and be consistent, particularly on agricultural lands. (LGAC 2014 Report)
- The EPA should work collaboratively with state regulators to reduce punitive approaches and increase facilitative solutions. Generally, communities facing fines and citations are already struggling with compliance. Fines rarely improve water quality; fines only reduce the local resources available to achieve compliance. A collaborative approach can be most effective in reaching water quality goals. (LGAC Drinking Water Report 2016)

■ The LGAC recommends that EPA work with state and local governments once a revised WOTUS final rule is developed and issued regarding enforcement options. (LGAC 2014 Report)

## LOCAL SOLUTIONS - INTEGRATED PLANNING

### *Background*

The LGAC believes that the CWA has had tremendously positive impacts on the rivers and streams of the United States which in turn has led to economic prosperity and well-being for our nation's communities. Communities and local governments are spending millions of dollars to improve our waterways and drinking water supplies. Some states even have more protective water quality standards than those required by federal law. The LGAC noticed a general feeling of distrust that the 2015 CWR generated. Further clarity on definitions, jurisdiction and exemptions should further aid Integrated Planning. However, it is uncertain how a revised WOTUS rule will factor in Integrated Planning efforts in general. Furthermore, there is a great deal of uncertainty how CWA 404 and the rule will impact local ordinances and how it can be integrated into state, tribal and local water quality plans. (LGAC 2014 Report)

### *Recommendations:*

■ The LGAC recommends that EPA work with cities and communities on Integrated Water Quality Planning that will incorporate all of the Clean Water Act provisions into local plans, including Section 404. This planning process is already ongoing and the LGAC looks forward to these proactive approaches to address water quality concerns while providing green infrastructure and multi-use amenities to serve our public and create jobs. (LGAC 2014 Report)

■ The LGAC recommends that EPA incentivize local, tribal and state agencies to engage in Integrated Water Quality Planning and develop policies, programs and projects that further the goals of the Clean Water Act. The rule should not in any way discourage local efforts to improve water quality through projects and programs. (LGAC 2014 Report)

- **Question 7- What should the agencies consider in communicating the final rule to state, local and tribal governments to help them fully understand these regulatory changes and implementing them efficiently and most cost-effectively?**

### *Background*

The LGAC believes that clear communication and outreach is essential at every level of government once a revised rule is developed. There are many misconceptions and uncertainties regarding EPA, the Army Corps of Engineers, and a revised WOTUS rule's impact on CWA programs.

In learning from the WOTUS 2015 rule, we heard concerns throughout the outreach process, and noted these concerns about the mixed messages relating to the economic impacts.

## Recommendations:

- The LGAC recommends that the EPA share the LGAC findings and recommendations with the state environmental commissioners, state agricultural directors, state water directors, and other state officials. (LGAC Water Report 2014)
  - The LGAC recommends that a Fact Sheet (one-page) be developed laying out the clear messaging of the revised WOTUS rule. It should also have graphics and a side-by-side comparison of what the rule currently is and what the revised rule proposes. This sheet should be developed to enhance public understanding of the rule. (LGAC Water Report 2014).
  - The LGAC believes it is important that EPA is aware of the potential for mixed messages in their communication with local agencies regarding the economic impact of a revised rule. Based on the Workgroup's 2014 field meetings, local agencies were skeptical of EPA's strong statement that the proposed rule did not change the definition of the 'Waters of the U.S.' Although this statement may have been factually correct, what likely occurred in the field is that local agencies may have experienced a permitting environment in direct contrast to this statement, as jurisdictional assertion was expected to increase. It is important that the EPA and the US Army Corps of Engineers do not understate the impact the rule may have on local jurisdictions. Also, the economic analysis should include all Clean Water Act programs. (LGAC Water Report 2014)
  - The LGAC recommends that the EPA continue to evolve and improve its communication with local governments, as well as EJ, agricultural and small communities with respect to the 'Waters of the United States.'
  - The LGAC recommends that EPA develop Fact Sheets to communicate the proposed changes in the WOTUS rule designed *specifically for locally elected officials*.
  - The EPA should work with State Municipal Leagues and other intergovernmental organizations to distribute communication materials for local governments. (LGAC Drinking Water Report 2016)
  - In EPA's annual or biannual meetings with State Environmental Commissioners, State Public Health Directors and State Agricultural Directors, the EPA should convene a special forum on 'Waters of the U.S.' on ways to assist local governments, EJ communities and rural communities. (LGAC Drinking Water Report 2016)
- ☐ **Question 8- The Workgroup will also develop recommendations on how the EPA can better work with local governments and engage local governments on issues such as: What additional regulatory issues could be revised or clarified to more effectively to help local governments understand how this rule would apply? Are there additional policy discussions that could help address local questions about implementation, in agricultural and rural small communities? Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?**



- 8.a. **What additional regulatory issues could be revised or clarified to more effectively to help local governments understand how this rule would apply?**

***Recommendations:***

■ The LGAC recommends that EPA should consider the impacts of a revised rule on NPDES and Wastewater systems. (Iowa NLC Letter).

■ The LGAC recommends that EPA consider a bright-line on 'other waters' to provide more clarity on what is jurisdictional under the CWA. For example, it would be well-advised that EPA determine with accuracy what areas are considered to be state or local ecologically significant areas such as source water and drinking water sources, and that states should provide a listing of these areas. (LGAC 2014 Report)

- 8.b. **Are there additional policy discussions that could help address local questions about implementation, in agricultural and rural small communities?**

***Background***

The Small Community Advisory Subcommittee (SCAS) of the LGAC investigated in greater depth the agricultural related issues to a revised WOTUS rule. The SCAS had some observations from the testimony received. Also, several of the SCAS Members are also agricultural producers or work closely with the Conservation Districts. Generally, at issue for the agricultural community in the 2015 CWR was the lack of clear definitions and the lack of clarity on exemptions.

Agricultural issues remain an area where there is a great deal of uncertainty and confusion regarding WOTUS. The SCAS believes that the agricultural community presents the greatest challenge but also offers the greatest receptivity to recognizing the importance of conservation and protection of our natural resources. Agriculture is a water-dependent business and cannot flourish without adequate supplies of clean and safe water.

***Recommendations:***

■ The LGAC recommends that EPA develop a "rural strategy" which would address the issue of 'Waters of the U.S.' on agricultural lands and rural communities. This rural strategy could provide more comprehensive planning and resources to address the full range of water quality and community issues associated with rural America and disadvantaged small communities.

■ The LGAC recommends that there be consistency between Natural Resources Conservation Services (NRCS) and EPA on interpretation of normal farming practices and that a clear definition of normal farming practices be included. Furthermore, the LGAC recommends a manual of agricultural exemptions be developed and published.

■ The LGAC recommends that the jurisdiction of farm ponds, irrigation ditches and ponds, artificial lakes and ponds created by excavation and/or diking dry land for purposes of stock watering, settling basins be exempt from WOTUS. (LGAC 2014 Report)

■ The LGAC recommends that floodplains be established at a level of 50- year, 100- year and 500 - year for agricultural purposes. (LGAC 2014 Report)

■ The LGAC was made aware of the State of Tennessee's Water Quality program, and the LGAC recommends that the EPA investigate this approach in regard to jurisdictional waters on agricultural lands. (LGAC 2014 Report)

■ The LGAC recommends that EPA facilitate better working relationships with the Corps, especially in regard to agricultural lands.

■ The LGAC recommends that dams and drainages designed for fire prevention be exempt from WOTUS. (LGAC 2014 Report)

■ The LGAC recommends that settling ponds and basins be determined on a regional case- by -case specific basis.

■ The LGAC recommends expanding the Conservation Reserve program to enhance protection of riparian areas and wetlands.

■ The LGAC recommends that EPA continue to work with NRCS to incentivize farming practices that improve water quality. (LGAC 2014 Report)

## **Prior Converted Croplands**

### ***Background:***

The Clean Water Rule excludes Prior Converted Croplands (PCC) from the definition of "Waters of the United States." (existing since 1992). The Rule also provides that even if another federal agency has deemed land to be PCC, the final authority regarding CWA jurisdiction remains with the EPA. Other provisions such as Swampbuster also incorporates a PCC exception but are administered by the USDA under the Food Security Act of 1985. The Act regulates federal benefits for farmers and includes provisions designed to discourage farming on converted wetlands. Under the Act, farmers who have altered a wetland after November 28, 1990, to make crop production possible are generally prohibited from receiving USDA-FSA-administered commodity, disaster, and conservation program benefits. Likewise, farmers who plant crops on wetlands converted between December 23, 1985, and November 28, 1990, are ineligible for program payments. Generally, drainage systems and other conversions in place before December 23, 1985, may continue in their existing form. The 2014 Farm Bill also reinstated a requirement that farmers must comply with Swampbuster provisions to receive crop insurance premium assistance beginning in 2015. The NRCS is responsible for making wetland determinations for purposes of USDA farm program eligibility only. Once a certified wetlands determination is made (and given to the farmer via form NRCS-CPA-026), it is binding on the property. All determinations made after July 3, 1996, are automatically deemed "certified." Determinations made prior to that date may be considered certified if they meet certain conditions. If a certified wetlands determination exists, the NRCS may not

issue a new determination, absent a request by the landowner and (1) a determination that natural changes have occurred to the topography or (2) an acknowledgment by NRCS that an error exists in the current report. It is uncertain how changes in the WOTUS rule will change the dates for PCC or Swampbuster provisions.

### ***Recommendations:***

■ A process for determining Prior Converted Croplands should be established with the new changes to the WOTUS rule. For example, what date should the PCC be referred to.

■ On agricultural lands, the Department of Agriculture should be given authority to make WOTUS jurisdictional determinations. (LGAC 2014 Report)

■ The LGAC recommends that normal agricultural practices be defined more effectively to achieve the desired results and to be accepted by the agricultural community. Normal farming practices are not limited to those listed and will change with advances in science and technology.

■ The LGAC recommends consistency of definitions among NRCS, EPA and other agencies involved in these issues. The SCAS believes that a glossary defining what agricultural exemptions are will be helpful. Specifically, the LGAC has heard a great deal of concern from Northern Minnesota where there are non-tilled drainage ditches and also from agricultural communities in Georgia. (LGAC 2014 Report)

■ The LGAC recommends more effective outreach to agricultural communities and small rural communities on a revised WOTUS rule.

### **8.c. Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?**

#### ***Background***

Rule language should not have broad inclusions and cities are concerned that jurisdictional calls will be dependent upon agency judgments and discretion for exclusions. The criteria need to be clear enough that cities do not have to either guess at application of a rule or wait for the agency to interpret a rule which creates uncertainty. It is unworkable for cities to rely on agency judgments and discretion for exemptions. There is a concern about the magnitude of the requests the agencies will be forced to address and the timeliness of the agencies' responses given any uncertainty of a new rule. For example, cities cannot be faced with significant delays to address critical storm-water infrastructure while waiting for agency action. Cities should be provided clarity by the agencies so that they can effectively plan and budget for the operation and maintenance of the storm-water collection systems without the uncertainty of the discretion of the agencies and when it will receive that agency judgment. In addition, without a specific exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other components that channel runoff, as well as non-MS4 storm-water systems and features/components, EPA and Army Corps open the door for litigation and citizen suits that could determine that they are. Waters

of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards. (Iowa NLC Letter)

### ***Recommendations:***

■ The EPA should plainly state how WOTUS rulemaking will impact storm-water collection systems and clearly exempt those parts of the systems that EPA does not wish to include. (Iowa NLC Letter)

■ The EPA should exempt green infrastructure from jurisdiction and outline the Agency's definition of what is included within green infrastructure similarly as for agricultural practices for 'normal farming practices'. (LGAC 2014 Report)

## **IV. Cost to Local Government**

### ***Background***

The LGAC heard extensive concerns that the US Army Corps of Engineers simply does not have enough resources to effectuate an efficient permit process now, or under a new rule, without additional resources. An ineffective permit process consumes scarce local, state and federal personnel and financial resources without achieving a value-added return on investment. A revised rule and the permitting process and implementation must recognize the scarcity of these resources such that results are optimized for the level of investment. (LGAC 2014 Report) Delays and additional permitting do not get calculated into a simplistic understanding of affordability of 2 percent of median household income (MHI), which the Agency utilizes to make determinations on significant cost impacts to local communities (Iowa NLC letter).

### ***Recommendations:***

■ The LGAC recommends that the EPA continue to coordinate with the US Army Corps of Engineers to ensure that the permit process is predictable and value-added. The proposed rule must be viewed in the context of how it will be implemented to validate that the resource protection outcome is balanced against the economic cost of the permitting process. Local, tribal and state agencies are at the front lines of achieving the goals of the Clean Water Act. Engaging local agencies as collaborative partners in the conversation with EPA and the US Army Corps of Engineers regarding implementation can only improve the process and the desired water resources protection results. (LGAC 2014 Report)

■ The LGAC recommends that EPA better understand the cost and resource implications, especially to local, state and tribal agencies, before drafting a revised rule. Local agencies are very concerned about cost, which is exacerbated by the uncertainty in the permitting process. (LGAC 2014 Report)

## **V. CONCLUSION**

The Local Government Advisory Committee (LGAC) provides a strong connection between the EPA and the communities striving to provide clean drinking water and maintain healthy source water. The LGAC's 'Waters of the United States' 2017 Report provides a series of recommendations that offer the EPA

practical solutions to complex challenges based on the experience of local and tribal governments. The LGAC is confident that our concepts and approaches can assist the EPA in developing a regulatory framework that inspires communities to act in the interest of clean, safe and affordable drinking water.

Many communities have already invested their resources in green infrastructure, integrated planning and innovation that advances the state of practice. Local, tribal and state governments are already leading clean water initiatives in their jurisdictions. EPA can utilize this experience, captured in the LGAC report, to develop clear, predictable, flexible and locally adaptable approaches to regulation.

Thank you to the EPA Administrator and the EPA Team for their partnership with the LGAC in advancing the goal of clean, safe and affordable drinking water across the United States.



## APPENDIX



Disclaimer: *This Report reflects what was conveyed during the course of the LGAC meetings. The Committee is not responsible for any potential inaccuracies that may appear in the Report as a result of information conveyed. Moreover, the Committee advises that additional information sources be consulted in cases where any concern may exist about statistics or any other information.*

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# Roster of LGAC Members

Waters of the United States  
2017 Report

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## 2017 ROSTER LGAC AND SCAS MEMBERS

### Chair of LGAC

The Honorable Bob Dixon

Mayor, Greensburg, KS

Greensburg, Kansas

### Chair of SCAS

The Honorable Robert Cope

Commissioner, Planning and Zoning, Salmon, ID

Salmon, Idaho

### LGAC AND SCAS MEMBERS

#### Region 1

Mr. Rodney Bartlett (SCAS Only)

Town Administrator

Peterborough, New Hampshire

The Honorable Kim Driscoll

Mayor, City of Salem

Salem, Massachusetts

The Honorable Miro Weinberger

Mayor, City of Burlington

Burlington, Vermont

The Honorable Jill Dusen (Vice-Chair)

Councilor, Portland, Maine

Portland, Maine

#### Region 2

Samara Swanston, Esq.

Counsel to NYC Council Environmental Protection Committee, New York, NY

New York, New York

**The Honorable Dawn Zimmer**  
Mayor, Hoboken, NJ  
Hoboken, New Jersey

**The Honorable Manna Jo Greene**  
County Legislator, Ulster County, NY  
District 19 Rosendale, New York

**Region 3**

**The Honorable Sal Panto, Jr.**  
Mayor, City of Easton  
Easton, Pennsylvania

**The Honorable Stephen T. Williams**  
Mayor, Huntington, WV  
Huntington, West Virginia

**Region 4**

**The Honorable Merceria Ludgood**  
Commissioner, Mobile County  
Mobile County, Alabama

**The Honorable Johnny DuPree, Ph.D.**  
Mayor  
Hattiesburg, Mississippi

**The Honorable Kitty Barnes**  
Commissioner, Catawba County, NC  
Terrell, North Carolina

**The Honorable Hardie Davis**  
Mayor, City of Augusta, Georgia  
Augusta, GA

**Ms. Susan Hann**  
Director, Planning Palm Bay County Schools, FL  
Palm Bay County, Florida

**Region 5**

**The Honorable Stephanie Chang**  
State Representative- House District 6  
State of Michigan

The Honorable Victoria Reinhardt  
Commissioner, Ramsey County, MN  
St. Paul, Minnesota

The Honorable Elizabeth Kautz  
Mayor, Burnsville, MN  
Burnsville, Minnesota

The Honorable Karen Freeman-Wilson  
Mayor, Gary, IN  
Gary, Indiana

Mr. Kevin Shafer, PE  
Executive Director, Milwaukee Metropolitan Sewerage District  
Milwaukee, Wisconsin

Region 6

The Honorable Mark Stodola  
Mayor, City of Little Rock  
Little Rock, Arkansas

The Honorable Norm Archibald  
Mayor, City of Abilene, TX  
Abilene, Texas

Jeff Witte  
Secretary of Agriculture, New Mexico  
New Mexico

Dr. Hector Gonzalez, MD  
Director of Health Department, Laredo, TX  
Laredo, Texas

Region 7

Teri Goodmann  
Assistant City Manager, City of Dubuque  
Dubuque, Iowa

The Honorable Tom Sloan  
State House Representative, State of Kansas  
Kansas

**Region 8**

**The Honorable Andy Beerman**  
City Councilor  
Park City, Utah

**The Honorable Brad Pierce**  
Council Member, City of Aurora, CO  
Aurora, Colorado

**Region 9**

**The Honorable Cynthia Koehler**  
Board of Directors, Marin County  
Marin County, California

**The Honorable David Bobzien**  
City Councilmember At-Large - City of Reno  
Reno, Nevada

**The Honorable Mary Casillas Salas**  
Mayor, City of Chula Vista  
Chula Vista, California

**Scott Bouchie**  
Environmental Management and Sustainability Director - City of Mesa  
Mesa, Arizona

**The Honorable Ryan Sundberg**  
Supervisor, Humboldt County, CA  
Humboldt County, California

**Region 10**

**Susan Anderson**  
Director, Portland Bureau of Planning and Sustainability  
Portland, Oregon

**The Honorable Shawn Yarity**  
Chairman, Stillaguamish Tribe  
Arlington, Washington



## APPENDIX 2

# EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE (LGAC) DRAFT CHARGE ON 'WATERS OF THE U.S.' (WOTUS)

## OVERVIEW

### Background and Description

On February 28, 2017, the President signed the Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth* by Reviewing the "Waters of the United States" Rule (issued June 2015).<sup>8</sup> The Executive Order gives direction to the Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule (CWR) and "publish for notice and comment a proposed rule rescinding or revising the rule." The E.O. also directs that EPA and the Army "shall consider interpreting the term 'navigable waters' in a manner "consistent with Justice Scalia's opinion in *Rapanos* "which includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

As part of EPA's efforts to consult with state and local government officials, EPA's Local Government Advisory Committee (LGAC) will provide its recommendations to the Administrator on revising the definition of "Waters of the United States" (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

### Project Scope

The agencies intend to follow an expeditious two-step process to provide certainty with the rule:

- 1) Establish the legal status quo by re-codifying the regulation that was in place prior to issuance of the CWR now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
- 2) Propose a new definition of Waters of the U.S. that would replace the 2015 CWR that reflects the principles outlined by Justice Scalia (*Rapanos* plurality opinion).

The LGAC consists of 36 local, state and tribal government elected and appointed officials representing cities, parishes, counties, municipalities, and other local political jurisdictions. Local officials are knowledgeable and provide unique perspectives on issues relating to a revised rule. Further, the LGAC has potential to engage other knowledgeable local officials with unique valuable on-the-ground perspectives and knowledge. Through this collaborative process, the chartered LGAC will provide Administrator Pruitt with expeditious and meaningful advice relating to a revised "Waters of the U.S." rule. Overall, the goal would be to develop recommendations to the EPA for consideration on a revised rule. This advice and recommendations come from an 'on the ground' local government perspective which will assist the agency in providing the best means to communicate a revised rule with local officials.

### Charge Issues

#### LGAC Charge:

The LGAC will develop recommendations for the EPA to consider in developing approaches to a revised rule defining "waters of the U.S." that ensures that the nation's waters are kept free from pollution while at the

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<sup>8</sup> <https://www.whitehouse.gov/the-pres-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

<sup>9</sup> *Rapanos v. United States*, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 LEd. 2d 159